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# THE COWLITZ INDIAN TRIBE

## REQUEST FOR A RESTORED LANDS OPINION

SUBMITTED TO

## THE NATIONAL INDIAN GAMING COMMISSION

Presented to Penny J. Coleman  
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## INTRODUCTION

This Request for a Restored Lands Opinion is submitted on behalf of the Cowlitz Indian Tribe of Washington State in conjunction with its request that the National Indian Gaming Commission (NIGC) approve the Cowlitz Tribal Gaming Ordinance. Because that Ordinance is site-specific, the Tribe herein identifies the factual and legal bases supporting a legal determination by NIGC that the Cowlitz Indian Tribe is a restored tribe and that the subject parcel is restored land within the meaning of Section 20(b)(1)(B)(iii) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(b)(1)(B)(iii). Because NIGC routinely consults with the Department of the Interior on Indian lands determinations, copies of this Request and the supporting documentation concurrently are being provided to the Associate Solicitor for Indian Affairs and to the Director of the Indian Gaming Management Staff, U.S. Department of the Interior.

The Cowlitz Indian Tribe was restored to recognition through the Bureau of Indian Affairs' Federal Acknowledgment Process in 2002. The Tribe, which is landless, has requested that the Department of the Interior accept trust title to a parcel of land in Clark County, Washington, approximately 151.87 acres in size (the "Cowlitz Parcel").<sup>1</sup> The Tribe also is requesting that Interior issue a Reservation Proclamation for the Cowlitz Parcel.<sup>2</sup> (A copy of the Tribal Council Resolution requesting that the land be taken into trust, proclaimed as initial reservation, and acknowledged to be restored is attached at **Tab A**.) The Tribe intends to build tribal housing, a cultural center, a tribal governmental office, and a Class III gaming facility on the Cowlitz Parcel.

When the relevant facts are applied to the standards which have been set forth in analogous situations by NIGC, the Department of the Interior (Interior), and the federal courts, it becomes clear that as a legal matter the Cowlitz Indian Tribe is a "restored tribe" (*see Part I* below), and that the Cowlitz Parcel is "restored land" (*see Part II* below) within the meaning of Section 20(b)(1)(B)(iii).

Before we address the restored status of the Tribe and the Cowlitz Parcel in Parts I and II, however, we offer brief notes on: the historical facts underpinning this memorandum (p. 3); the

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<sup>1</sup> Interior currently is developing an Environmental Impact Statement in conjunction with the Tribe's fee-to-trust request. A scoping hearing already has taken place, and the scoping report was published in February, 2005.

<sup>2</sup> There is no prohibition on, and no inconsistency inherent in, the Tribe requesting that the Department proclaim the Cowlitz Parcel to be its reservation while concurrently advancing its legal argument that the Cowlitz Parcel constitutes lands restored to a restored tribe. The interplay of these two exceptions was discussed at some length in *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan* (*Grand Traverse Band I*), 46 F. Supp. 2d 689, 699 (D.D.C. 2000). In rejecting the federal government's contention that IGRA's initial reservation and restored lands exceptions were mutually exclusive, the court found that "it is perfectly sensible that 'acknowledged' and 'restored' tribes may on occasion overlap." This reading of the initial reservation and restored lands exceptions specifically was reaffirmed in *TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 n.8 (D.D.C. 2002). *See also Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan* (*Grand Traverse Band II*), 198 F. Supp. 2d 920, 931-933 (W.D. Mich. 2002).

Tribe's jurisdiction and eventual exercise of governmental authority over the Cowlitz Parcel (p. 4); the fact that the Cowlitz Parcel is not yet in trust (p. 6); and the restored lands exception itself (p. 6).

## BRIEF NOTE ABOUT THE HISTORICAL FACTS UPON WHICH THE TRIBE RELIES

The historical facts on which the Tribe relies in this Request are gleaned almost entirely from the BIA technical reports underpinning the Bureau's recognition of the Tribe in 2002, and from documents relating to the Indian Claims Commission (ICC) litigation concerning the Tribe's successful claim against the United States seeking compensation for Cowlitz lands taken by the United States in the nineteenth century. See *Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v United States*, 21 Ind. Cl. Comm. 143 (1969).

The United States, of course, is bound by the findings of the ICC and the admissions made by the United States therein. In addition, the factual findings contained in the Bureau's technical reports relating to Cowlitz federal recognition are entitled to deference. *Miami Nation of Indians of Indiana v Babbitt*, 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000) (in reviewing Interior decision concerning federal recognition of Indian tribe, "courts accord the agency's decision a high degree of deference"). Courts commonly defer to Interior's expertise on tribal recognition and associated issues. As the D.C. Circuit explained:

The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably *to determine which tribes have previously obtained federal recognition*. . . . [T]he Department has been implementing its regulations for eight years and, as noted, it employs experts in the fields of history, anthropology and genealogy, to aid in determining tribal recognition. This . . . weighs in favor of giving deference to the agency by providing it with the opportunity to apply its expertise.

*James v United States Department of Health and Human Services*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (emphasis added).

We note that in NIGC's April 13, 2001 letter to Judge Douglas Hillman regarding the restored status of the Grand Traverse Band of Ottawa and Chippewa Indians (discussed in more detail below), the Commission appears to agree that facts and legal conclusions established through formal administrative adjudication are entitled to greater deference. Surely the Bureau's Federal Acknowledgment Process should be characterized as a formal adjudicative process, as was the process by which the Interior Board of Indian Appeals affirmed the Bureau's decision to acknowledge the Cowlitz Indian Tribe (see *In re Federal Acknowledgment of the Cowlitz Indian Tribe*, 36 IBIA 140 (2001)).

The Tribe believes that the facts clearly established by the Bureau of Indian Affairs and the Indian Claims Commission are more than sufficient to support a finding that the Cowlitz Parcel is land restored to a Tribe that is restored to federal recognition under IGRA Section 20(b)(1)(B)(iii). However, if for any reason NIGC believes that the facts as determined by the Bureau of Indian Affairs and the Indian Claims Commission require supplementation, the Tribe is in possession of a large amount of additional primary and secondary source materials which it would be happy to provide to NIGC.

References in this Request to the “HTR” are references to the Historical Technical Report issued by the Bureau of Indian Affairs’ Branch of Acknowledgement and Research, or BAR, (now known as the Office of Federal Acknowledgment) in conjunction with its recommendation of recognition for the Cowlitz Indian Tribe. Citations to “ATR” are references to BAR’s Anthropological Technical Report, and citations to “GTR” are references to BAR’s Genealogical Technical Report. In addition, we refer to facts included within the Bureau’s Final Determination on Cowlitz Recognition Summary Under the Criteria for Final Determination for Federal Acknowledgment of The Cowlitz Indian Tribe and Technical Report, Final Determination, Cowlitz Indian Tribe, dated February 14, 2000, and the Reconsidered Final Determination dated December 31, 2001, 67 Fed. Reg. 607 (Jan. 4, 2002). *See also* Final Determination to Acknowledge the Cowlitz Indian Tribe, 65 Fed. Reg. 8436 (Feb. 18, 2000).

The BAR recognition documents are voluminous, and so are being provided as a set in a separate binder. (The BAR documents also are available at the Bureau of Indian Affairs Federal Acknowledgment Decision Compilation, <http://64.62.196.98/adcd/adcd.html>.) The ICC documents are at **Tab B**.

### BRIEF NOTE ON JURISDICTION THE EXERCISE OF “GOVERNMENTAL POWER”

IGRA permits a tribe to conduct gaming on “Indian lands” over which the tribe, as a legal matter, possesses governmental jurisdiction. *See* 25 U.S.C. § 2710(b) and (d). Where Indian lands are located off-reservation (as in the case of the Cowlitz who have no reservation), IGRA further requires that, as a factual matter, the tribe exercise “governmental power” over the Indian lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). Obviously a tribe must have legal jurisdiction over the land before the tribe can, as a factual matter, exercise “governmental power” over the land. *See Medhoopda Indian Tribe of the Chico Reservation*, NIGC Memorandum at 3 (2003) (NIGC *Medhoopda* Opinion) (“[t]ribal jurisdiction is a threshold requirement to the exercise of governmental power”); *Bear River Band of the Rohmerulle Rancheria*, NIGC Memorandum at 4 (2002) (NIGC *Rohmerulle* Opinion) (citations omitted). (These NIGC Memoranda are discussed in more detail below.)

NIGC has found that tribes are presumed to possess governmental jurisdiction within “Indian country.” NIGC *Medhoopda* Opinion at 3, citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *see also* NIGC *Rohmerulle* Opinion at 5. Indian country is defined in 18 U.S.C. § 1151, and the Supreme Court has made clear that Indian Country/§ 1151 encompasses trust land. *Oklahoma Tax Comm’n v. Citizen Band of Pottawatomie Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *Oklahoma*

*Tax Comm'n v Chickasaw Nation*, 515 U.S. 450, 452-53 (1995). See also NIGC *Robnerville* Opinion at 5-6 (tribal trust lands held to be Indian country although not part of formal reservation); NIGC *Mechoopda* Opinion at 4 ("once land is acquired into trust, it is Indian country, and we can conclude that the Tribe has jurisdiction over it"); November 12, 2002 Letter from Secretary of the Interior Gale Norton to Cyrus Schindler, Seneca Nation President at 6 (*Seneca Nation* Letter) (Interior acknowledges that the Seneca Nation will exercise governmental jurisdiction over certain property once title to that property attains restricted status). Hence, once the Cowlitz Parcel obtains trust status, the Cowlitz Indian Tribe will, as a legal matter, possess jurisdiction over it.

Because the Cowlitz Tribe has no reservation, the Cowlitz Parcel must be treated as off-reservation lands. Accordingly, even when the Cowlitz Parcel acquires trust status and the Tribe thereby acquires governmental jurisdiction over it, the Tribe will still have to demonstrate that it will exercise present-day governmental power over the property as required by IGRA Section 4(4)(B), 25 U.S.C. § 2703(4)(B).

Of course present-day governmental power over the land cannot be established before the land is acquired in trust or restricted fee. NIGC *Mechoopda* Opinion at 5. However, in analogous situations both NIGC and Interior have found that an applicant tribe will exercise governmental powers over lands once the lands are acquired in trust or restricted fee. See NIGC *Mechoopda* Opinion at 5; *Seneca Nation* Letter at 6.

In the case of the Cowlitz, it is clear that the Tribe will exercise governmental authority over the Cowlitz Parcel once it acquires trust status because the Tribe will build housing units, a cultural center, a tribal government building, and a gaming facility on the property. The existence and structure of the Tribe's exercise of governmental authority over the property is evidenced by the Tribal Gaming Ordinance which was duly adopted by Tribal Resolution and which currently is the subject of NIGC review.

Further evidence of the existence and structure of the Tribe's intention to exercise governmental authority over the Cowlitz Parcel is embodied in the Memorandum of Understanding (MOU) in which the Tribe has entered with Clark County. This MOU confirms that the Tribe intends to develop the property (consistent with county zoning, design and building codes), and intends to ensure adequate law enforcement and emergency services coverage by reimbursing the County for the provision of those services. See MOU at ¶ 1.5. (A Tribal Council Resolution and a copy of the MOU are provided at **Tab C**.)

### **BRIEF NOTE ON THE FACT THAT THE COWLITZ PARCEL IS NOT YET HELD IN TRUST**

As is clear from the discussion above relating to the exercise of governmental jurisdiction, there is no bar to NIGC issuing an opinion concerning whether a parcel of land is eligible for restored lands status before that land acquires trust status. In other words, the fact that Interior has

not yet acted on the Tribe's fee-to-trust application does not preclude a determination by NIGC regarding the restored lands status of the Cowlitz Parcel.

NIGC has issued "Indian lands" determinations regarding fee lands in analogous situations. For example, in reviewing a management contract NIGC explained that "[t]his opinion assumes that the BIA will take the land into trust for the benefit of the Tribe . . . [t]his opinion cannot be relied upon if the land is not taken into trust." NIGC *Mechoopda* Opinion at 3. Interior similarly has expressed a legal opinion as to whether certain lands would qualify for an exception to the ban on gaming on after-acquired lands (in that case related to whether the lands would qualify as lands taken into trust as part of the settlement of a land claim), even though those lands had not yet achieved restricted status. See *Seneca Nation* Letter at 6 ("[t]he Department assumes that the Nation will exercise governmental powers over these lands when they are acquired in restricted fee").<sup>3</sup>

In sum, NIGC has authority to issue a Restored Lands Opinion for the Cowlitz Parcel before it acquires trust status, and the Tribe requests that NIGC exercise that authority. Of course the Tribe has no objection to an Opinion that is qualified similarly to the *Mechoopda* Opinion to the effect that the Opinion "cannot be relied upon if the land is not taken into trust."

#### BRIEF NOTE ON THE STANDARDS FOR THE RESTORED LANDS EXCEPTION

The "restored lands" exception in IGRA allows gaming on lands acquired after October 17, 1988 if the lands in question "are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2701(b)(1)(B)(iii). Accordingly, the two fundamental questions which must be answered for the Cowlitz are:

1. Is the Cowlitz Tribe "an Indian tribe restored to federal recognition?" and
2. Is the Cowlitz Parcel land "taken into trust as part of a "restoration" of lands to the Tribe?

The Executive Branch's<sup>4</sup> reading of the restored lands exception primarily has been articulated in six written opinions:

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<sup>3</sup> The Seneca Nation letter concerned a tribal-state gaming compact, which Interior ultimately allowed to be "deemed approved" pursuant to 25 U.S.C. § 2710(d)(8)(C).

<sup>4</sup> As indicated herein, both Interior and NIGC have issued Indian lands determinations under IGRA. Interior and NIGC have executed a Memorandum of Understanding that provides for coordination between the agencies on such

- Letter from NIGC General Counsel to Judge Douglas W. Hillman, regarding whether the Turtle Creek Casino site that is held in trust by the United States for the Benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from the Indian Gaming Regulatory Act's general prohibition of gaming on lands acquired after October 17, 1988, dated August 31, 2001 (NIGC *Grand Traverse* Opinion).
- Memorandum from Associate Solicitor, Division of Indian Affairs to Assistant Secretary, Indian Affairs, regarding *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v Babbitt*, 116 F. Supp. 2d (D.D.C. 2000) and proposed gaming on the Hatch Tract in Lane County, Oregon, dated December 5, 2001 (Interior *Coos* Opinion).
- Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, regarding whether gaming may take place on lands taken into trust after October 17, 1988, by Bear River Band of Rohnerville Rancheria, dated August 5, 2002 (NIGC *Rohnerville* Opinion).
- Memorandum from NIGC Acting General Counsel to NIGC Chairman, regarding whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of Chico Rancheria, dated March 14, 2003 (NIGC *Mechoopda* Opinion).
- NIGC Final Decision and Order, In Re: Wyandotte Nation Amended Gaming Ordinance, September 10, 2004 (NIGC *Wyandotte* Opinion).
- Letter from NIGC Acting General Counsel to the Karuk Tribe of California, regarding whether the "Yreka Property" falls within the restored lands exception to Section 2719's prohibition against gaming on trust lands acquired after October 17, 1988, dated October 12, 2004 (NIGC *Karuk* Opinion).

For the reader's convenience, copies of these opinions are attached at **Tab D**.

NIGC's and Interior's reasoning in their *Grand Traverse Band* and *Coos* Opinions was informed in part by guidance provided by two federal district court opinions, *Grand Traverse Band of Ottawa and Chippewa Indians v United States Attorney for the Western District of Michigan, et al. (Grand Traverse Band I)*, 46 F. Supp. 2d 689 (W.D. Mich. 1999), and *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000) (*Coos*). NIGC's interpretation of the restored lands exception as expressed in the April 31, 2001 NIGC *Grand Traverse Band* Opinion was confirmed by the federal District Court for the Western District of Michigan in *Grand Traverse Band*

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determinations. Hence, Interior has expressly concurred in several of the restored lands determinations issued by NIGC.

*of Ottawa and Chippewa Indians v United States Attorney for the Western District of Michigan, et al.*, (*Grand Traverse Band II*), 198 F. Supp. 2d 920, *aff'd*, 369 F.3d 960 (6th Cir. 2004). Also of particular note for the purposes of this Request is *City of Roseville v Norton*, 348 F.3d 1020 (D.C. Cir. 2003), in which the D.C. Circuit confirmed the restored status of the Auburn Rancheria. Copies of these judicial opinions are attached at **Tab E**.

Below we apply the reasoning used by NIGC, Interior and the federal courts in their respective opinions to the Cowlitz factual history. From this analysis it is clear that the Cowlitz Indian Tribe should be deemed a “restored tribe” and that the Cowlitz Parcel, once it obtains trust status, should be deemed “restored lands.”

## **PART I**

### **THE COWLITZ INDIAN TRIBE IS A “RESTORED TRIBE”**

To be “restored,” a tribe must at one time have been recognized, later have been terminated, and then again later be re-recognized. *Grand Traverse Band I* at 699 (“a tribe is ‘restored’ when its prior recognition has been taken away and later restored”). As demonstrated below, the Cowlitz Tribe was first recognized by the United States in 1855 (and again several times thereafter), then administratively terminated by the federal government (evidenced, *inter alia*, by the Department of the Interior’s refusal to allow the Tribe to reorganize its government under the Indian Reorganization Act), then restored to recognition again in 2002 when Interior extended recognition to the Tribe through the Federal Acknowledgement Process (codified at 25 C.F.R. Part 83).

#### **1. Recognition: The Cowlitz Tribe was recognized by the federal government in 1855, and that recognition was reaffirmed in the mid- and late-nineteenth century.**

In 1846, the United States acquired the Oregon Territory pursuant to treaty with Great Britain. (Oregon Treaty, July 17, 1846, 9 Stat. 869.) The Washington Territory was carved from the Oregon Territory in 1853, and Washington’s first territorial governor was Isaac Ingalls Stevens. Washington eventually achieved statehood in 1889.<sup>5</sup>

Almost immediately after the Washington Territory was separated from Oregon, the United States began to survey the Indian populations in western Washington with an eye toward securing land cessions from them. 21 Ind. Cl. Comm. 143, 166 at ¶ 14 (ICC Findings of Fact).<sup>6</sup> In 1854, the

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<sup>5</sup> See Washington State University’s website at [www.wsulibs.wsu.edu/holland/masc/masctour/washingtonterritory/](http://www.wsulibs.wsu.edu/holland/masc/masctour/washingtonterritory/) for a general history of the State of Washington.

<sup>6</sup> “On March 22, 1854, Colonel U.T. Simmons was appointed special Indian Agent for Washington Territory. Governor Isaac Stevens of Washington Territory instructed him to make a tour of the various tribes within his district to prepare the Indians for future negotiations.” *Id*

Acting Commissioner of Indian Affairs (Charles E. Mix) specifically instructed Governor Stevens to commence such treaty negotiations with the Washington tribes. *Id.* In February of the following year (1855), Stevens convened negotiations now known as the Chehalis River Treaty Council (held near Cosmopolis, Washington Territory) with the “Upper and Lower Chehalis, Cowlitz, Lower Chinook, Quinault and Queets Indians.” *See* HRT at 36-39 and 21 Ind. Cl. Comm. at 143, 166 at ¶ 14 (quotation from the later source). The Commissioner of Indian Affairs ordered Stevens to use those negotiations to “endeavor to unite the numerous bands, and fragments of tribes into tribes and provide for the concentration of one or more of such tribes upon the reservations which may be set apart for their future homes.” 21 Ind. Cl. Comm. 143, 166 at ¶ 14.

The Tribes at the Chehalis River Treaty Council, including the Cowlitz, expressed a willingness to cede their lands, but negotiations broke down when Governor Stevens refused to give these tribes reservations within or closer to their traditional territories. *Id.* (“Governor Stevens would not accede to the requests of the Indians for the reservations they desired and no treaty was commenced”).

The United States’ clear effort to obtain a land cession treaty from the Cowlitz is unambiguous evidence of previous federal recognition. The Bureau of Indian Affairs explicitly acknowledged this in BAR’s Historical Technical Report: “[t]reaty negotiations can only take place with a sovereign entity.” HTR at 11 (internal citations omitted). Furthermore, the Bureau took great care to emphasize that its focus on the 1855 date of the Chehalis River Treaty Council (which failed to produce a reservation for the Cowlitz) should not also be read as the date on which such recognition ended just because the treaty negotiations were unsuccessful:

The 1855 date [of unambiguous Federal acknowledgement] is being used for the sake of efficiency in producing the [historical, anthropological and genealogical] technical reports. The use of the 1855 date by the BIA in these reports is not to be regarded as a determination by BIA that unambiguous Federal acknowledgement of the bands of Cowlitz Indians represented at the Chehalis River Treaty Council, or of bands of Cowlitz Indians not represented at that council, ceased at that date.

*Id.* Indeed, there continued to be other indicia of federal recognition of the Cowlitz Tribe for several decades in the nineteenth century. The Bureau itself confirmed that federal acknowledgement continued at least until 1878-1880, during which time Federal Indian agents appointed chiefs for the Cowlitz and conducted censuses of the Cowlitz. Cowlitz Final Determination at 4; Reconsidered Final Determination at 22. *See also* HTR at 67-79 for lengthy narrative list of official federal interaction with the Cowlitz Tribe during this time period.

Because the Bureau acknowledged that the Cowlitz at one time had enjoyed federal recognition, the Bureau determined that the Tribe was eligible to proceed through the Federal Acknowledgment Process under the provisions of 25 C.F.R. § 83.8. Under Section 83.8, previously recognized applicant tribes need only demonstrate tribal existence since the “point of last federal acknowledgment” rather than back to a date of first white contact. 25 C.F.R. § 83.8(d). The Bureau acknowledged that the Cowlitz Tribe met at least one of the criteria for a determination that it

previously had been unambiguously recognized because the United States had engaged in treaty negotiations with the Tribe. See 25 C.F.R. § 83.8(c)(1) and Summary under the Criteria, Final Determination, Cowlitz Indian Tribe at 2-4; Reconsidered Final Determination, 67 Fed. Reg. 607 (Jan. 4, 2002).

Hence it is absolutely clear that the Cowlitz Indian Tribe and its tribal government was recognized by the United States in the mid- and late-nineteenth century.

**2. Termination: The Cowlitz Tribe was terminated during a period of time when the Bureau viewed landlessness and individual citizenship as indicia of a terminated government-to-government relationship.**

From 1915 through 1929 the Department of the Interior opposed a series of pieces of proposed federal legislation that would have given the federal Court of Claims jurisdiction to hear the Tribe's claims against the United States for compensation for Cowlitz lands alienated without payment to the Tribe.<sup>7</sup> (These efforts to confer jurisdiction in the Court of Claims obviously predate the formation of the Indian Claims Commission in 1946.) Interior's opposition to the Court of Claims legislation was based in large part on Interior's view that it no longer had a government-to-government relationship with the Tribe. More specifically, the Secretary of the Interior wrote to Senator J.W. Harreld, Chairman of the Senate Committee on Indian Affairs to express Interior's opposition to the 1924 version of the Court of Claims legislation because, among other things,

[t]he records show that as early as 1893 these Indians were reported as being scattered through the southern part of the State of Washington, most of them living on small farms on their own; that they hardly formed a distinct class, having been so completely absorbed into the settlements; and that fully two-thirds of them were citizens and very generally exercised the right of suffrage[.] . . . [I]n view of the forgoing, it will be seen that the Cowlitz Indians are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic.

HTR at 126.

During this period in our history the prevailing view at the Department of the Interior and at the Department of Justice was that tribes which no longer possessed reservations and whose

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<sup>7</sup> The Cowlitz Tribe occupied a vast area of southwest Washington. 21 Ind. Cl. Comm. 143, 144. Despite the fact that the Cowlitz Tribe never signed a land cession treaty and Indian title was never extinguished by Congress pursuant to the Indian Trading and Intercourse Act (25 U.S.C. § 177), the United States government treated Cowlitz lands as public lands. 21 Ind. Cl. Comm. 143, 166, Findings of Fact ¶ 14. In 1863, President Lincoln, via proclamation, opened up Cowlitz lands in southwest Washington for non-Indian settlement. HTR at 73. This action by the United States deprived the Cowlitz Indians "of their original Indian title without their consent or compensation." *Id.*

members had been absorbed into the “body politic,” (e.g., where tribal members had become citizens and had acquired the right to vote) ceased to “need” a guardian-ward relationship and therefore ceased to continue to hold a government-to-government relationship with the United States.

This policy likely had its roots in the enactment of the Dawes (General Allotment) Act of 1887, which authorized the massive allotment of land within Indian reservations to individual Indians. The gist of the General Allotment Act of course was to encourage Indians to assimilate into majority culture (and thereby make them “self-sufficient”) by giving them plots of land within reservation boundaries to which they eventually would gain fee title. Proponents of the General Allotment Act believed that Indian tribes eventually would cease to exist as independent entities. See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 131-32 (1982 ed.).

However, the federal policy of administratively terminating government-to-government relationships with reservationless, citizen Indians was most specifically articulated just before the turn of the (twentieth) century in an 1897 legal opinion from U.S. Department of Justice Assistant Attorney General Van Devanter (directed to the Secretary of the Interior) regarding the Miami Tribe of Indiana. In that opinion the Assistant Attorney General opined that the Indiana Miamis, who because of their treaty history no longer possessed a reservation, but rather owned land in fee and enjoyed full citizenship, no longer were wards of the government, and therefore were no longer entitled to the protections of the United States. The 1897 Van Devanter Opinion was written in the context of the Miamis’ request that the United States protect certain Miami allotment lands from taxation by the state. The Assistant Attorney General wrote:

There are no Indian reservations in the State of Indiana, and hence if these [Miami] Indians are to be treated as entitled to the services of the United States . . . it must be because they come under the head of “allotted Indians.” While an Indian who has received an allotment of land might ever afterwards be properly described as an “allotted Indian,” yet it will not be said that it was intended that he should still enjoy this special privilege after the relationship of ward and guardian between him and the United States had in all other particulars ceased. It [allotment] was not intended to create a favored class of citizens, but only to afford the Indian due protection during the period in which the United States continued to exercise control over the land as trustee, or over his person as guardian. *When both these relationships cease, all obligations on the part of the government to the Indian, except such as are enjoyed by all other citizens, are cancelled. It will not be concluded that Congress intended to continue this protection to the Indian after the reason for exercising it had ceased.*

Decisions of the Department of Interior and General Land Office in Cases Relating to the Public Lands, Vol. 25, July – December 1897, pp. 426 – 432, 430, Washington, D.C.: Government Printing Office, 1898 (emphasis added). A copy is attached at Tab F. In reaching this conclusion, Van Devanter notes that the

facts, as now presented, are that *these [Miami] people have used their lands free of control by the United States for seventy years or over*; that they have had no executive recognition in a tribal capacity since 1881, and that if they were ever allotted Indians, *they became citizens of the United States in 1887*. It does not seem that they can be held to be within the purview of the act [providing that the United States district attorney shall protect “allotted Indians”] under consideration.

*Id.* at 431 (emphasis added). Based on this Department of Justice opinion (and despite the fact that Congress had not severed government-to-government relations with the Miami) Interior henceforth treated the Indiana Miami Tribe as terminated, a fact which has been confirmed by the federal courts and which continues to haunt the Tribe (which remains unrecognized today). *See Miami Nation of Indians of Indiana, Inc. v Lujan*, 832 F. Supp 253 (N.D. Ind. 1993).

The facts relating to the Cowlitz Tribe’s existence at the turn of the twentieth century were very similar to those of the Miami. The Cowlitz Tribe was without a reservation, and its individual tribal members owned land in fee, were scattered among non-Indian settlers, held U.S. citizenship, and generally voted. These general facts and the impact they had on the federal government’s view that the Cowlitz no longer enjoyed federal recognition as a tribal entity are recounted in the Secretary’s testimony before the Senate Indian Affairs Committee in 1924 discussed above (*see also* HTR at 126), as well as in numerous other official federal documents as described below.

For example, in 1933 Bureau of Indian Affairs Commissioner John Collier wrote to Mr. Lewis Layton of Tacoma, Washington (a person apparently seeking enrollment in the Cowlitz Tribe for himself and his family):

The receipt is acknowledged of your letter of October 5, making application for enrolment [sic] with the Cowlitz tribe of Indians; and stating that several of your relatives would like to be enrolled therewith.

No enrolments [sic] are now being made with the remnants of the Cowlitz tribe which in fact, *is no longer in existence as a communal entity. There are, of course, a number of Indians of Cowlitz descent in that part of the country, but they live scattered about from place to place, and have no reservation under Governmental control.* Likewise, they have no tribal funds on deposit to their credit in the Treasury of the United States, in which you and your relatives might share if enrolled.

Only Indians who have the status of Federal wards are entitled to free hospitalization at a Government Indian hospital.

HTR at 123-124 (quoting 1933 Collier letter) (emphasis added).

The Bureau’s position that the federal relationship to the Tribe was terminated was reiterated in 1951 when Superintendent of the BIA Western Washington Agency, Raymond H. Bitney, wrote

that the Cowlitz “tribe is landless and without Official recognition of its tribal status[.]” *Id.* at 145. Again in 1968, a BIA official informed a Cowlitz tribal member that “the Cowlitz . . . are not a *reservation group* and . . . are not presently recognized as an organized tribe by the United States.” *Id.* at 149 (emphasis added).

Of particular note, in 1975 the Department of the Interior expressly stated to Congress that it opposed the distribution of a portion of the Tribe’s ICC award (the Tribe eventually was successful in pursuing its land claim before the ICC) to the Tribe itself because “[t]he Cowlitz Tribe of Indians is not a Federally-recognized tribe . . . [t]herefore there is presently no Federally-recognized successor to the aboriginal entity aggrieved in 1863 [when President Lincoln opened up southwestern Washington to white settlement].” *Id.* at 156. As a result, Interior would only support distribution of the ICC award to individual descendants on a per capita basis. *Id.* (This is discussed in more detail in Part II below.)

BIA-BAR noted that the Congressionally-created and sanctioned American Indian Policy Review Commission explicitly listed Cowlitz within its 1977 report on terminated and federally non-recognized tribes. HRT at 157. Speaking specifically about Washington State tribes, the Policy Review Commission concluded:

The most frequently used method of disregarding the trust relationship with the tribes has simply been to deny them a trust land base. The Bureau of Indian Affairs and the Department of the Interior have in the past stated that it was their policy not to provide protection or services to those tribes which lacked a land base. As the tribes began to question the “wisdom” of the Department’s policy, they found, in fact, there was no written policy or regulation. The Department had chosen over the course of many years to simply ignore the needs of these tribal groups, apparently hoping they would just go away.

Report on Terminated and Nonfederally Recognized Indians: Final Report to the American Indian Policy Review Commission. Task Force No. 10 at 181 (1976). *See* copy at **Tab G**.

Finally, we note that it is well established by the federal courts that the manner of termination cannot be used to justify disparate treatment among tribes. *See TOMAC v Norton*, 193 F.Supp.2d 182, 193 (D.D.C. 2002) (manner of termination, whether through legislative or administrative action, does not justify disparate treatment under IGRA); *Sault Ste Marie Tribe of Lake Superior Chippewa Indians v United States*, 78 F.Supp.2d 699, 705-07 (W.D. Mich. 1999) (rejecting distinction between legislatively and administratively terminated tribes that were subsequently “restored” to federal recognition); *cf. Grand Traverse Band of Ottawa & Chippewa Indians v United States Attorney*, 46 F.Supp.2d 689, 696-99 (W.D. Mich. 1999) (manner of restoration, whether through legislative, judicial or administrative action, does not justify disparate treatment under IGRA.)

NIGC expresses concern in its recent *Karuk* Opinion that the Karuk Tribe had not produced “evidence of any affirmative action by the United States to terminate the relationship with the Tribe.” NIGC *Karuk* Opinion at 3. We trust that NIGC will agree that the voluminous evidence of

the United States' long-held and repeatedly-stated position that the Cowlitz Tribe was unrecognized constitutes unequivocal evidence of *de facto* termination. Indeed, a finding that the Cowlitz Tribe had not been terminated would produce the almost perverse result that the Tribe has enjoyed federal recognition since 1855, and, as a consequence, it was entitled to obtain trust land and conduct gaming operations under IGRA before obtaining federal acknowledgment through the Federal Acknowledgment Process in 2002.

**3. Restoration: The Cowlitz Tribe was restored to recognition when it successfully completed the administrative Federal Acknowledgment Process.**

It is now well established that terminated tribes which have regained their status through the Federal Acknowledgment Process are entitled to be recognized as having the same “restored” status as tribes which have been restored by Congress or by judicial determination. Indeed, in the NIGC *Grand Traverse* Opinion, *supra*, NIGC specifically concluded that there is no basis to create distinctions among tribes based on the manner in which they have been restored. Hence, NIGC allowed no distinction to be made between tribes which had been restored through Congressional action and tribes that had been recognized through the Federal Acknowledgment Process. NIGC *Grand Traverse* Opinion at 13-14, *see also Grand Traverse Band II*, 198 F. Supp. 2d at 932 (“[a] tribe is ‘restored’ when its prior recognition has been taken away and later restored” whether congressionally or through the federal acknowledgement process). *See also* 25 U.S.C. § 476(f), which prohibits disparate treatment of tribes (“the United States shall not . . . make any decision or determination . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes”). Hence, clearly the Cowlitz Tribe’s administrative acknowledgment in 2002 constitutes a “restoration” of its status.

In sum, Federal recognition was first provided to the Cowlitz Indian Tribe in 1855. The Tribe was administratively terminated in the early twentieth century, as evidenced by numerous and unambiguous statements from federal officials throughout the twentieth century. When the Tribe successfully completed the Federal Acknowledgement Process in 2002, it was fully restored, in the most literal sense, to the recognition it had enjoyed when Governor Stevens first sought to treat with it in 1855. For all of the forgoing reasons, the Cowlitz Indian Tribe is clearly a “restored” tribe within the meaning of Section 20(b)(1)(B)(iii) of IGRA.

## **PART II**

### **THE COWLITZ PARCEL IS “RESTORED LANDS”**

NIGC, Interior and the federal courts have articulated a set of standards by which a determination can be made as to whether a given parcel of land should be deemed “restored” for the purpose of IGRA Section 20(b)(1)(B)(iii). Under these standards, a restored tribe must be able to demonstrate that “restored” status for the land in question is justified by one or more of the following factors:

1. The factual circumstances of the acquisition;
2. The location of the acquisition, encompassing an analysis of the Tribe's (a) historical and/or (b) modern connection to the area; or
3. The temporal relationship of the acquisition to the tribal restoration.

NIGC *Grand Traverse* Opinion at 15; NIGC *Karuk* Opinion at 5; NIGC *Wyandotte* Opinion at 9; *Grand Traverse Band I* at 700; *Grand Traverse Band II* at 935.

The land at issue need not satisfy all three factors to constitute “restored lands” within the meaning of IGRA. The court in *Grand Traverse Band II* specifically articulated these factors using the word “or” to connect them, and it unambiguously found that “land may be considered part of a restoration of lands on the basis of timing [of the acquisition] alone,” (*i.e.*, on the basis of the temporal relation alone.) *Grand Traverse Band II* at 936. As demonstrated below, the Cowlitz Parcel easily satisfies all three of the factors, any one of which when taken alone would support a finding that the parcel constitutes “restored lands” within the meaning of IGRA.

#### 1. Factual circumstances of the acquisition.

NIGC, Interior and the courts have looked at a variety of equitable considerations in determining whether the factual circumstances of an acquisition merit a restored lands determination. As discussed below, we believe that the factual circumstances underpinning the Tribe's efforts to obtain tribal lands, particularly when viewed in the context of how the Tribe became landless and what hardships that landlessness has caused, dictate a finding that the Cowlitz Parcel would constitute “restored lands” if acquired in trust.

##### (a) The Cowlitz Indian Tribe Has a Long History of Trying to Acquire Replacement Lands

NIGC, Interior, and the courts have looked to the historical and contemporaneous intent of the restored tribe in relation to the tribe's acquisition of the subject parcel. Because the agencies and the courts have stated that not every parcel of land acquired in trust by a restored tribe shall be eligible for restored lands status, they have looked more favorably on tribes which are landless or nearly landless, and which are able to show evidence of specific intent to obtain replacement lands.

The history of the Cowlitz Indian Tribe's efforts to obtain lands to replace aboriginal territory taken by the federal government is long and well documented. Indeed, it must be emphasized that the Cowlitz quest for the restoration of a tribal land base well predates both the advent of Indian gaming in 1988 and the Tribe's restoration to federal recognition in 2002.

Cowlitz members first initiated land claims in 1908 by submitting affidavits to the Department of the Interior for certain lands on Cowlitz Prairie. HTR at 106–107. Interior noted that “[t]his affidavit would serve as the basis of the Cowlitz claims case all the way through to the final 1973 ICC judgment award.” In 1909, “the Cowlitz presented a further claims petition[.]” This further claim was a broader assertion of aboriginal title to the traditional tribal area[.]” *Id.* at 108.

The Cowlitz continuously pursued federal legislation that would enable the Tribe to present its claim. From 1915 through 1929, bills were introduced in Congress to provide the Court of Claims with jurisdiction over the Cowlitz claim. HTR at 126. In 1928, Congress finally passed legislation only to have it vetoed by President Coolidge. HTR at 127. It was not until after Congress enacted legislation in 1946 establishing the Indian Claims Commission that the Cowlitz would be able to pursue claims against the United States.

From the very moment the Tribe compromised with the United States on the amount of money the Tribe would accept to settle its ICC land claim case against the United States in 1973, the Tribe unrelentingly insisted that some of its settlement money be set aside for land acquisition. Hence, almost immediately after the ICC granted a final compromise settlement in the amount of \$1.5 million (approximately 87 cents per acre), the Tribe began to lobby for a land acquisition fund. The Tribe initially insisted that ten percent of the 1.5 million award be set aside for the Tribe's use for land acquisition. *See generally HRT* at 152.

In 1975 the House and Senate took up legislation to give effect to the ICC settlement and to provide for an award distribution plan. In Senate hearings concerning S. 1334 (94<sup>th</sup> Congress), the Tribe fervently reiterated its determination to use some of the settlement money for land acquisition. Cowlitz Tribal Council Chairman Joseph Cloquet testified in support of S. 1334, which included a provision (section 3(1)) setting aside \$10,000 for tribal land acquisition. In his testimony, Chairman Cloquet strenuously objected to the House companion bill from which the \$10,000 land acquisition provision had been stripped:

The House Committee on Insular Affairs . . . accepted our distribution plan except for section 3, subsection 1: "10,000 [dollars] will be set aside by the Secretary of the Interior for the purchase of land for the benefit of the Cowlitz Tribe of Indians," which was deleted.

I submit to you, gentlemen, that this section *is the very heart of the legislation to save our tribal entity, tribal ties, our Indianness denied us in the past century, and what culture we have left. Many of us, and I for one, would gladly give up the per capita distribution entirely for this provision in S. 1334. I am not willing to give up my Indian heritage for dollars. I will not stand by and see my people disbursed [sic] and become a small footnote to history.*

We have completed plans for a Cowlitz Cultural Center that we intend to put on the \$10,000 tract of land we acquire through this bill.

*Distribution of Funds to Cowlitz and Grand River Band of Ottawa Indians: Hearing Before the Subcomm. On Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 94<sup>th</sup> Cong. 68-69 (1975) ("S. 1334*

Hearing Report”) (emphasis added). A copy of the S. 1334 Hearing Report is attached at Tab H. Cowlitz tribal Chairman<sup>8</sup> Roy Wilson testified to the same effect:

*A very important part of this legislation is the allocation of \$10,000 for the purchase of land of which we are desperately in need . . . [as a] tribal entity, and to preserve for our posterity that Indian culture which is peculiarly our own.*

Let us be consistent with the very heart of this legislation. This legislation has to do with the distribution of a very small token settlement for very valuable land which the Cowlitz Tribe never ceded to the U.S. Government.

In the Indian War of 1855-56, the Cowlitz Tribe never fought against the U.S. Army, but rather fought for it and with it . . . [Subsequently,] the President and the Congress wanted to group a number of these small tribes on one reservation together. The Cowlitz knew this would be suicide to live on a reservation with neighboring tribes whom they had fought against for the U.S. Army and they therefore refused.

The end result was that the tribes who fought against the United States were awarded land and the Cowlitz who fought for this great country were awarded nothing. . . .

*You, the present-day leaders of our great land, have the opportunity to reveal an element of integrity in justice by allowing us to spend, out of this distribution, a mere pittance of \$10,000 for a few small acres of land which we originally had aboriginal title to nearly 4 million acres. . . .*

*We, the Cowlitz, are only asking for enough out of our distribution to purchase 510 acres for the posterity of our economic and social well-being, for the opportunity to retain and perpetuate our own individual culture.*

*Id.* at 70-71 (emphasis added).

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<sup>8</sup> A note about the structure of Cowlitz tribal government: before European contact and into the early twentieth century the leadership of the Cowlitz Indians was through a system of appointed chiefs. See HTR at 7. From 1912 through the 1930s, the Cowlitz transitioned from a chieftain system to a presidential election, alternating between the Upper and Lower Cowlitz Bands. *Id.* at 7. The election of a president continued through the early 1970s. *Id.* at 8. Then in 1974 the Cowlitz Indian Tribe revised its constitution to establish a tribal council as the governing body of the tribe headed by a chairman. *Id.* at 154. The Tribe also continues to elect a Tribal Chair (without regard to band affiliation). Hence, the Cowlitz Indian Tribe is governed by both a tribal Chairman and by the Chairman of the Tribal Council, who speaks for the Council.

Ironically, the Department of the Interior strongly objected to S. 1334's settlement distribution plan. Interior took the position that because the Cowlitz Tribe was unrecognized, it was ineligible to hold trust lands and that therefore all funds should be distributed on a per capita basis to individual Cowlitz members. In a letter dated September 24, 1975, Interior expressed its views on S. 1334: "[t]he Cowlitz Tribe of Indians is not a Federally-recognized tribe. Therefore, there is presently no Federally-recognized successor to the aboriginal entity aggrieved in 1863." S. 1334 Hearing Report at 6. One month later, on October 29, 1975, Commissioner of Indian Affairs Morris Thompson sent Senator James Abourezk of the Subcommittee on Indian Affairs, Senate Committee on Interior and Insular Affairs, another letter stating:

Throughout the 1850's and 60's the United States made a concerted effort to conclude a treaty. . . . From that time to the present, there has been no continuous official contact between the Federal Government and any tribal entity which it recognizes as the Cowlitz Tribe of Indians.

See S. 1334 Hearing Report at 49 (emphasis in original). Because of these views, Interior opposed the provision of any funding to the Tribe for land acquisition. HRT at 152.

Legislation providing for the distribution of the Cowlitz settlement was again introduced in the 97<sup>th</sup> Congress. See S. 2931 and H.R. 3612 at **Tab H**. The Committee on Indian Affairs reported favorably on S. 2931, explaining that "[t]he monies are compensation for the taking by the United States over 100 years ago of Cowlitz Tribal lands located in what is now Lewis, Cowlitz, Clark, Pierce, Skamania and Wahkaiakum counties in the State of Washington." S. Rep. No. 97-689, at 1 (1982) (emphasis added). The Committee summarized that Interior objected to S. 2931 and earlier versions of the legislation on the basis that it provided for the purchase of tribal lands. Interior expressed the concern that legislation providing for the purchase of tribal lands would confer federal recognition and thereby circumvent the Department's Federal Acknowledgment Process. *Id.* at 2. Presumably attempting to respond to this concern, S. 2931 imposed a two-part process by first requiring that 20% of the judgment fund be set aside for "lawful purposes, including the purchase of land [in fee] for the tribe." If the Tribe obtained federal recognition administratively, S. 2931 then required the Secretary to take those tribal lands into trust. *Id.* at 3. The Department of the Interior objected to S. 2931 as well, recommending that the land provisions of the bill be stricken because "the 'Cowlitz Indian Tribe' does not have a government-to-government relationship with the United States at this time[.]" *Id.* at 7. Had Interior not objected, there would be no question that the factual circumstances of the Tribe's acquisition of land pursuant to S. 2931 would have satisfied the restored lands test.

The Tribe's commitment to ensuring that some of its ICC settlement money would be set aside for land acquisition was so strong that the Tribe refused to agree to legislation settling its claim for over thirty years, never relenting in its commitment to ensuring that some of its land claim settlement money be set aside for the acquisition of replacement lands. Hence, it was not until *last year* (two years after federal recognition) that the Tribe finally agreed to federal legislation implementing a distribution plan for the Tribe's ICC land claim award. In 2004 Congress enacted, and President Bush signed, the Cowlitz Indian Tribe Distribution of Judgment Funds Act (the "2004 Settlement Act"). The Settlement Act is embodied in Public Law 108-222; 118 Stat. 623,

April 30, 2004, and a copy is attached at **Tab I**. Section 4(f)(1) of the 2004 Settlement Act specifically sets aside 21.5%<sup>9</sup> of the settlement money for the Tribe to be used for “[p]roperty acquisition for business or other activities which are likely to benefit the tribe economically or provide employment for tribal members” (emphasis added).

It should come as no surprise that the Cowlitz Tribe has resolved to use settlement funds received pursuant to Section 4(f)(1) of the 2004 Settlement Act to help pay for the Cowlitz Parcel.<sup>10</sup> The Cowlitz will be using funds paid to it for Cowlitz land wrongfully taken in the nineteenth century to buy new replacement land in the twenty-first century. No use of the Tribe’s ICC land claim settlement money could be more appropriate. Surely this should be a significant factor weighing in support of a restored lands finding.

Finally, we note that the Tribe’s focus on acquiring tribal lands was not only expressed in the legislative context, but also is evidenced in the Tribe’s own internal records. For example, in 1998, (four years before final recognition) the Cowlitz Tribal Council considered issues relating to an initial reservation and articulated a need to “[l]ocate potential parcels of land for a variety of uses, such as tribal headquarters, business development, cultural or recreational pursuits.” See Minutes of 1998 General Council Meeting. In 2001, the General Tribal Council discussed issues related to the location of lands for tribal economic development (including gaming) and the need to have lands placed into trust for that purpose. Minutes of 2001 General Council Meeting. Copies of both sets of Tribal Council minutes, along with a Tribal Council Resolution confirming their authenticity are attached at **Tab K**.

Had the Cowlitz Indian Tribe been provided with money to purchase land in the 1970s or in the three decades that followed, the Tribe would now be asking that such fee lands be acquired in trust, and we believe those fee-to-trust applications today would easily be granted because the Tribe would have well established its modern connections to those lands. The Tribe therefore was significantly disadvantaged by the United States’ refusal to allow the Tribe to use settlement money for land acquisition at an earlier date.

**(b) Additional Equitable Considerations Also Strongly Weigh in Favor of the Cowlitz Tribe**

NIGC and the courts have explained that “restoration” suggests “a taking back or being put in a former position.” *Karuk* Opinion at 6. In a recent case involving the restored lands of the

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<sup>9</sup> The 2004 Settlement Act is structured so that the Tribe only has access to the interest derived from the \$1.5 million in principal awarded by the Settlement Act. Thus, Section 4(f)(1) sets aside 21.5% of the *interest* received on the settlement funds.

<sup>10</sup> See Tribal Council Resolution No. 05-19, 2005, provided at **Tab J**. Title to the parcel currently is held by a third party that has committed to complete the sale to the Tribe and to transfer title to the property to the United States at such time as the United States agrees to accept trust title.

Auburn Rancheria, the D.C. Circuit emphasized that the concept of “restoration” is not limited to lands located within a tribe’s prior reservation (of which of course the Cowlitz has none), but rather also encompasses the concept of “restitution” which focuses on the present circumstances and location of the tribe. *City of Roseville v Norton*, 348 F.3d 1020 (D.C. Cir. 2003). In *City of Roseville*, the Department of the Interior had accepted into trust land for the Auburn Tribe that was located approximately forty (40) miles from that tribe’s former reservation, and Interior had determined that the new trust land was “restored land” under Section 20 (b)(1)(B)(iii). The plaintiff City of Roseville argued that the tribe’s new trust land was too far away from the tribe’s former reservation to be properly characterized as “restored.” The plaintiff also argued that the new land was considerably more valuable than the tribe’s former reservation lands and that therefore the new lands should not be deemed an appropriate “replacement” for the tribe’s lost reservation lands.

The D.C. Circuit rejected the City of Roseville’s challenge, finding that the “restored lands” exception serves broad purposes and so does not limit a restored tribe to lands literally located within its former reservation. The court very specifically found that such broad purposes include restitution for historical wrongs, promotion of economic development as envisioned by IGRA, and equitable dealing with tribes which simply weren’t federally recognized when IGRA was enacted in 1988. Regarding historical wrongs, the D.C. Circuit stated:

[T]he syntax of the statute [2719(b)(1)(B)(iii)], which discusses not simply the restoration of the lands themselves, but their restoration “for an Indian tribe,” fits more comfortably with the concept of restitution. . . . [That a] “restoration of lands” could easily encompass *new* lands given to a restored tribe to re-establish its land base *and compensate it for historical wrongs is evident*[.]

*Roseville*, 348 F.3d at 1027 (emphasis added). Regarding historical wrongs and lost opportunities, the court stated:

Had [the tribe] never been terminated, it would have had opportunities for development in the intervening years, including the possible acquisition of new land prior to the effective date of IGRA. A “restoration of lands” compensates the Tribe *not only for what it lost by the act of termination, but also for opportunities lost in the interim*.

*Id.* at 1029 (emphasis added). Regarding the propriety of considering economic development opportunities as part of the calculus of whether a parcel of land should be deemed “restored,” the court said:

The IGRA plainly includes exceptions to its general prohibition of gaming on off-reservation sites, and Congress’ purpose in enacting IGRA includes the promotion of tribal economic self-sufficiency[.]

*Id.* at 1027. And finally, regarding the compelling policy concern of ensuring that landless tribes not federally recognized in 1988 are not unfairly disadvantaged vis-à-vis tribes recognized before IGRA was enacted, the court counseled that:

[T]he exceptions in IGRA § 20(b)(1)(B) serve purposes of their own, *ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.*

*Id.* at 1030 (emphasis added).

Despite the Cowlitz Tribe's specific statements to Federal negotiators in the Chehalis River Treaty Council that the Tribe was willing to cede its lands to the United States in exchange for a reservation, and despite the fact that the United States soon thereafter appropriated the Cowlitz' lands without compensation and opened those lands to white settlement,<sup>11</sup> the Cowlitz were never provided with a reserved homeland. This is in stark contrast to most of the other Chehalis River Treaty tribes, including the Upper and Lower Chehalis, Quinault and Queets Indians who were provided with reservations and whose federal recognition has never since been in doubt. (The Quinault and Queets were provided a reservation homeland when they signed the Quinault Treaty on July 1, 1855. *See* 12 Stat. 971. The Upper and Lower Chehalis Indians were provided a reservation in 1864 by order of the Secretary of Interior.) There were only two Chehalis River Treaty Council groups left without reservations – the Cowlitz and the Chinookan bands – and it is no coincidence that they both came to be deemed unrecognized despite the federal government's efforts to obtain land cession treaties from them in the nineteenth century.<sup>12</sup> (*See* discussion at Part I, Section 2.)

The fact is, had the Cowlitz been provided with a reservation in the 1850s (as were most other Washington and Oregon tribes with which Stevens negotiated during that time period),<sup>13</sup> the

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<sup>11</sup> *See* footnote 7 at page 9 *supra*.

<sup>12</sup> The effects of landlessness on the Chinookan Bands have been devastating. One group of Chinookan Band (the ones who lived just to the south of the Cowlitz and with whose territory the Cowlitz territory overlapped) are widely considered to have become extinct. Another Chinookan Band (which is further west, closer to the Pacific coast) applied for federal recognition under the name "Chinook Tribe" through the Federal Acknowledgement Process, but the Bureau of Indian Affairs ultimately found that the tribe's existing documentation did not satisfy the Part 83 criteria. Hence, although the Bureau found that the United States previously acknowledged the Tribe, the Bureau concluded, among other things, that existing documentation did not establish that external observers identified the Chinook tribe as an Indian entity from 1873 to 1951. Had the Chinookan Bands been afforded a land base in 1855, their status would never have been doubted by the Bureau and one or more Chinookan Bands would be federally recognized today.

<sup>13</sup> Treaties benefiting other Washington and Oregon Tribes include: Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1135, (Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians.); Treaty of Point Elliot, Jan. 22, 1855, 12 Stat. 927, (Dwamish, Suquamish, Sk-kahl-mish, Sam-ahmish, Smalh-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-guilch, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians (the Lummi were also included in this treaty); Treaty of Point No Point, Jan. 26 1855, 12 Stat. 933, (S'Klallams, viz: Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, Elh-wa, Pishtst, Hunnint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch, and Chem-a-kum tribes.); Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939, (several villages of the Makah tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett); Walla Walla Treaty of Camp

Tribe would never have been deemed terminated by virtue of its landlessness (*see* discussion in Part I above), it would have been allowed to reorganize under the Indian Reorganization Act,<sup>14</sup> and it would have received continual federal assistance like all other recognized tribes over the last century and a half. Most strikingly, the Cowlitz Tribe would have a land base today – a land base that enjoyed trust status before October 17, 1988 – a land base on which the Tribe could have been enjoying the economic development benefits of Indian gaming for the last seventeen years. These facts, particularly when considered in the context of the equitable factors set forth in *City of Roseville*, fully support a finding that the Cowlitz Parcel is “restored lands.”

In sum, given the substantial and continuing hardships suffered by the Tribe as the result of the United States’ confiscation of its lands and the United States’ failure to provide the Tribe with a reservation, given the many significant opportunities lost to the Tribe as the result of its not having had a reservation land base for a century and a half, given the Tribe’s well-documented efforts to obtain tribal lands even before it regained federal recognition (and even before there was such a thing as Indian gaming), given the speed with which the Tribe petitioned for trust status for the Cowlitz Parcel after it was recognized (*see* Part II section 3 of this Request, following), and given the fact that this Tribe is *landless*, it is absolutely clear that the “factual circumstances” underlying the Cowlitz acquisition of the Cowlitz Parcel warrant a finding that the Cowlitz Parcel is “restored lands” for the purposes of Section 20(b)(1)(B)(iii) of IGRA.

## 2. The Location of the Cowlitz Parcel.

NIGC and the courts have found that the physical location of the parcel can provide a basis for finding that the land constitutes “restored lands.” NIGC has applied the location basis by evaluating the applicant tribe’s (a) historical connection to the parcel, (b) its modern connection to the parcel, or both. *See generally* NIGC *Wyandotte* Opinion, NIGC *Grand Traverse* Opinion, and Interior *Cox* Opinion.

The Cowlitz Tribe’s strong historical and modern ties to the area where the Cowlitz Parcel is located are discussed in subsections (a) and (b), respectively, below.

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Stevens, June 9, 1855, 12 Stat. 945 (Walla-Wallas, Cayuses, and Umatilla tribes, and bands of Indians); Yakama Treaty of Camp Stevens, June 9, 1855, 12 Stat. 951, (Yakama, Palouse, Piquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kah-milt-pay, and Se-ap-cat, confederated tribes and bands of Indians.); Quinault Treaty, July 1, 1855, 12 Stat. 971 (Qui-nai-elt and Quil-leh-ute Indians.).

<sup>14</sup> The Cowlitz Indian Tribe sought to organize under the Indian Reorganization Act (IRA) of 1934 in 1934, *see* HTR at 131, and then again in 1975 (*see* HTR at 157). The first time the Tribe sought to organize the “Bureau of Indian Affairs did not perceive that the Cowlitz Tribe should vote on the I.R.A. since one of the major concerns of the I.R.A. was protection of a tribal land base” and the Tribe did not have one. *Id.* at 131. The Bureau balked again when the Tribe tried a second time in 1975 to reorganize under the IRA, though this time for a different reason: lack of federal acknowledgment. *Id.* at 157. The Cowlitz’ petition for organization was handed off to the Branch of Acknowledgment and Research. *Id.*

(a) The Cowlitz Tribe's Historical Connection to the Area

The Cowlitz Indian Tribe has very strong historical ties to the area in which the Cowlitz Parcel is situated. These historical ties are evidenced in a broad spectrum of primary and secondary source materials, most of which predate enactment of the Indian Gaming Regulatory Act in 1988. However, the Tribe believes there is ample factual evidence already adjudicated by the Indian Claims Commission, and ample information identified and accepted by the Bureau of Indian Affairs' Branch of Acknowledgment (BIA-BAR) in its Cowlitz recognition documentation, to establish the Tribe's historical connection to the area. For that reason the Tribe here relies solely on 1) the Indian Claims Commission's Findings of Fact and Decision in *Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v United States*, 21 Ind. Cl. Comm. 143 (1969) and exhibits and testimony entered into evidence in that ICC litigation; and 2) the Department of the Interior's Technical Reports prepared in conjunction with its Final Determination Acknowledging the Cowlitz Indian Tribe. The Tribe reiterates its offer, however, to provide additional primary and secondary source materials if that would be helpful to the Commission's deliberation.

In 1969, the Indian Claims Commission judicially determined that the Cowlitz Indian Tribe historically *exclusively* used and occupied an extensive area of southwestern Washington extending from Naches Peak (near Mount Rainier) in the north to the mouth of the Kalama River in the south. *Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v United States*, 21 Ind. Cl. Comm. 143, 170 (1969). See Figure 1. This adjudicated *exclusive* use and occupancy area lies only fourteen (14) miles to the north of the Cowlitz Parcel.

The 14-mile distance between the Cowlitz Parcel and Tribe's ICC-designated exclusive use and occupancy area is consistent with distances accepted by NIGC and the courts in analogous restored lands opinions. See, e.g. NIGC *Robnerville* Opinion (parcel of land located six (6) miles from Tribe's reservation found to be "restored lands"); NIGC *Mechoopda* Opinion (parcel of land located ten (10) miles from the Tribe's original reservation found to be "restored lands"); and *City of Roseville* (land located forty (40) miles from tribe's original reservation held to be "restored lands").



chronological order. For ease of reference, each historical connection described below is identified on the map at **Figure 2**<sup>15</sup> by the paragraph number preceding the description of the historical connection.

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<sup>15</sup> See also USGS map of area surrounding the Cowlitz parcel, attached at **Tab L**.

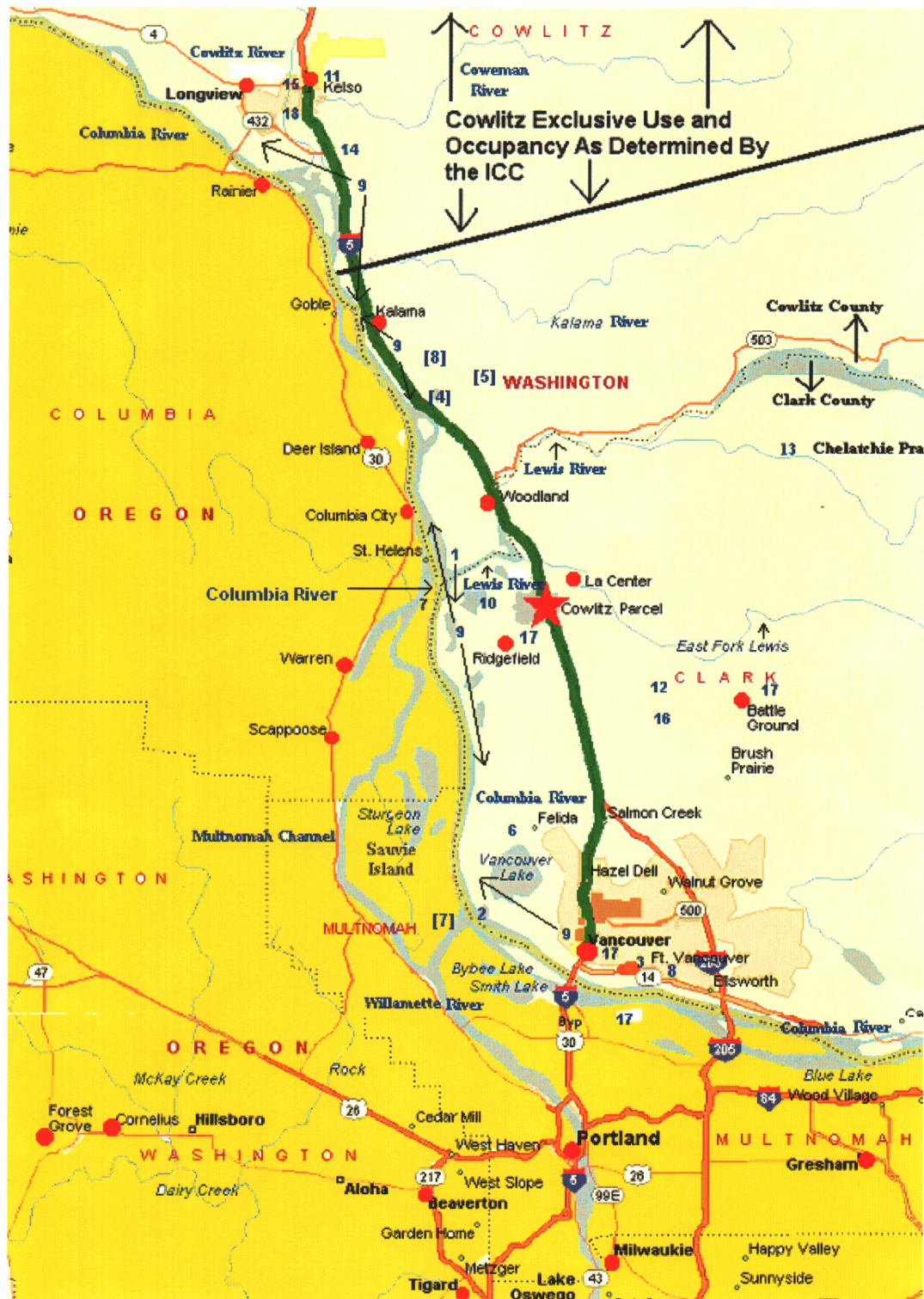


Figure 2. Map showing an approximate 25-mile radius around the Clark County Parcel. Cowlitz historical connections are identified by blue numbers that correspond to numbered paragraphs at pp. 26-31. Modern tribal member populations are identified with red dots.

## FIRST WHITE CONTACT THROUGH THE 1820S

1. In the era of first white contact, the Cowlitz Tribe occupied lands in and around the Cowlitz Parcel. BIA-BAR found that:

From the earliest descriptions of explorers, the historical Cowlitz Indians lived mainly along the length of the Cowlitz River, from slightly above its mouth, or juncture with the Columbia River, as far as upriver as the area of Randle, Washington. *There were also villages and/or hunting camp sites along other rivers such as the . . . Lewis.*

GTR at 4-5 (emphasis added). The Lewis River (which is less than one mile north of the Cowlitz Parcel) forms the boundary between modern-day Cowlitz and Clark Counties, emptying into the Columbia River.

2. The presence and control of the Cowlitz Tribe within what would later be designated Clark County was documented in 1813-1814. BIA-BAR found that:

In approximately 1813-1814, Alexander Henry of the North West Company wrote that Cowlitz, to the number of 100 men, had a battle with Casino (a Multnomah Chinookan chief) at the lower entrance of the Willamette.

HTR at 19. The lower entrance of the Willamette is located near present day Vancouver, Washington, approximately thirteen (13) miles south of the Cowlitz Parcel.

3. The Cowlitz Tribe continued to occupy and conduct trade in present day Clark County in the 1820s. BIA-BAR found:

Fort Vancouver, in modern Clark County, Washington, was opened by the Hudson's Bay Company in 1825. In the mid-1820s . . . the Cowlitz Chief Schannanay competed with the Chinook Chief Concomly and his son-in-law Casino at Fort Vancouver for control of trade.

HTR at 20 (internal quotations and citations omitted). Fort Vancouver (as well as the City of Vancouver) is approximately fifteen (15) miles south of the Cowlitz Parcel.

4. The Cowlitz lived in close proximity to Chinookan people in the area in which the Cowlitz Parcel is located. There was significant intermarriage between the groups, especially after the Chinookan population was decimated by disease. BIA-BAR found

[i]n the period between 1820 and 1850, the Cowlitz moved onto the Columbia itself in the region immediately north and south of the mouth of the Cowlitz – there they intermarried with the remnants of the Chinookan people who had previously occupied the region.

GTR at 5 fn. 2. The exact location along the Columbia corresponding to this paragraph is not known, so the number [4] is shown on the map at Figure 2 in brackets.

5. Despite a history of strong trading relationships and a tradition of intermarriage, apparently the Cowlitz and Chinook occasionally irritated each other. The ICC found that:

In 1825 Dr. Scouler traveled in the Columbia River area. He visited a “Kowlitch” village and reported the Indians were preparing for war with the Chinook.

*Simon Plamondon*, 21 Ind. Cl. Comm. at 155. (This area is three (3) miles southwest of the Cowlitz Parcel.) The exact location along the Columbia corresponding to this paragraph is not known, so the number [5] is shown on the map at Figure 2 in brackets.

#### 1830 THROUGH THE 1855 CHEHALIS RIVER TREATY COUNCIL NEGOTIATIONS

6. In 1830, Governor George Simpson (of the Northern Department of the Hudson’s Bay Company) explained that “nearly the whole” of the fur trade near Fort Vancouver

pass[es] through the hands of three Chiefs or principal Indians viz. Concomely King or Chief of the Chinooks at Point George, Casseno Chief of a Tribe or band settled nearly opposite to Belle vue Point and *Scharnawry the Cowlitch Chief whose track from the borders of Pugets Sound strikes on the Columbia near to Belle vue Point*.[.]

Fur Trade and Empire, George Simpson’s Journal at 86 (1931) (emphasis added).<sup>16</sup> Bellevue Point is located at the confluence of the Columbia and Willamette rivers, approximately ten (10) miles south of the Cowlitz Parcel.

7. In the ICC litigation the court accepted the veracity of a 1834 report of a John K. Townsend regarding a Cowlitz village near the mouth of the Lewis River:

while camped on a plain below Warrior’s Point (near the mouth of the Lewis River)<sup>17</sup> [Townsend] was near several large lodges of

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<sup>16</sup> This fact was submitted to the ICC by the Cowlitz. The United States did not contest the validity of the statement, though it stated that it was irrelevant for the purposes of the issues before the ICC.

<sup>17</sup> Although this was found as a fact by the Indian Claims Commission, BAR suggests that the location is on the southern end of Sauvie Island near the mouth of the Willamette rather than the northern end. See HTR at 25 n. 14. Either location supports the validity of the Tribe’s historical presence in Clark County. The BIA-BAR placement of the site is shown on Figure 2 in brackets (“[7]”).

Kowalitsk<sup>18</sup> [Cowlitz] Indians. When the Kawlitsks [Cowlitz] became bothersome, he reported that his camp-keeper, a Klikatat, who “has no great love for the Kowalitsk [Cowlitz] Indians,” would “clear the coast.”

*Simon Plamondon*, 21 Ind. Cl. Comm. at 155. Regarding Townsend’s report, the United States’ expert testified that:

These may be a summer encampment or summer encampments. I don’t know. I do - *I have always felt* that at least there in the pre-epidemic period the Cowlitz people-that is the Indians I call Cowlitz, the Salish speaking group on the lower and middle Cowlitz River made some use of the Columbia. . . . And I might add, sir, that the implication from Townsend would be that they were making use of the Columbia not the Lewis River. He said *near the mouth of the Lewis* which is a very good way of - as we all know - of distinguishing sections of a larger river in terms of the smaller tributaries.

*The Cowlitz Tribe v United States*, Transcript, Vol. 4 of 5 at p. 395-396. The mouth of the Lewis River (where it empties into the Columbia) is located less than three (3) miles northwest of the Cowlitz Parcel.

8. Further evidence of the Cowlitz presence in and around Clark County is found in the unfortunate records of the devastating effect that European-disease epidemics had on the Cowlitz, as chronicled by non-Indians at Fort Vancouver. BIA-BAR found that:

On October 11, 1830, Dr. John McLaughlin, Chief Factor of the Hudson’s Bay Company *at Fort Vancouver*, wrote that the intermitting fever had appeared and carried off  $\frac{3}{4}$  of the Indian population in the vicinity. The Lower Cowlitz component of the modern petition[er] can be documented to descend from this greatly reduced tribal stock[.]

GTR at 7. Fort Vancouver is located approximately fifteen (15) miles to the south of the Cowlitz Parcel.

9. At Governor Stevens’ 1855 Chehalis River Treaty Council, Cowlitz tribal leader Ow-hye explained that the English had taken Cowlitz land from the Cowlitz River to Vancouver

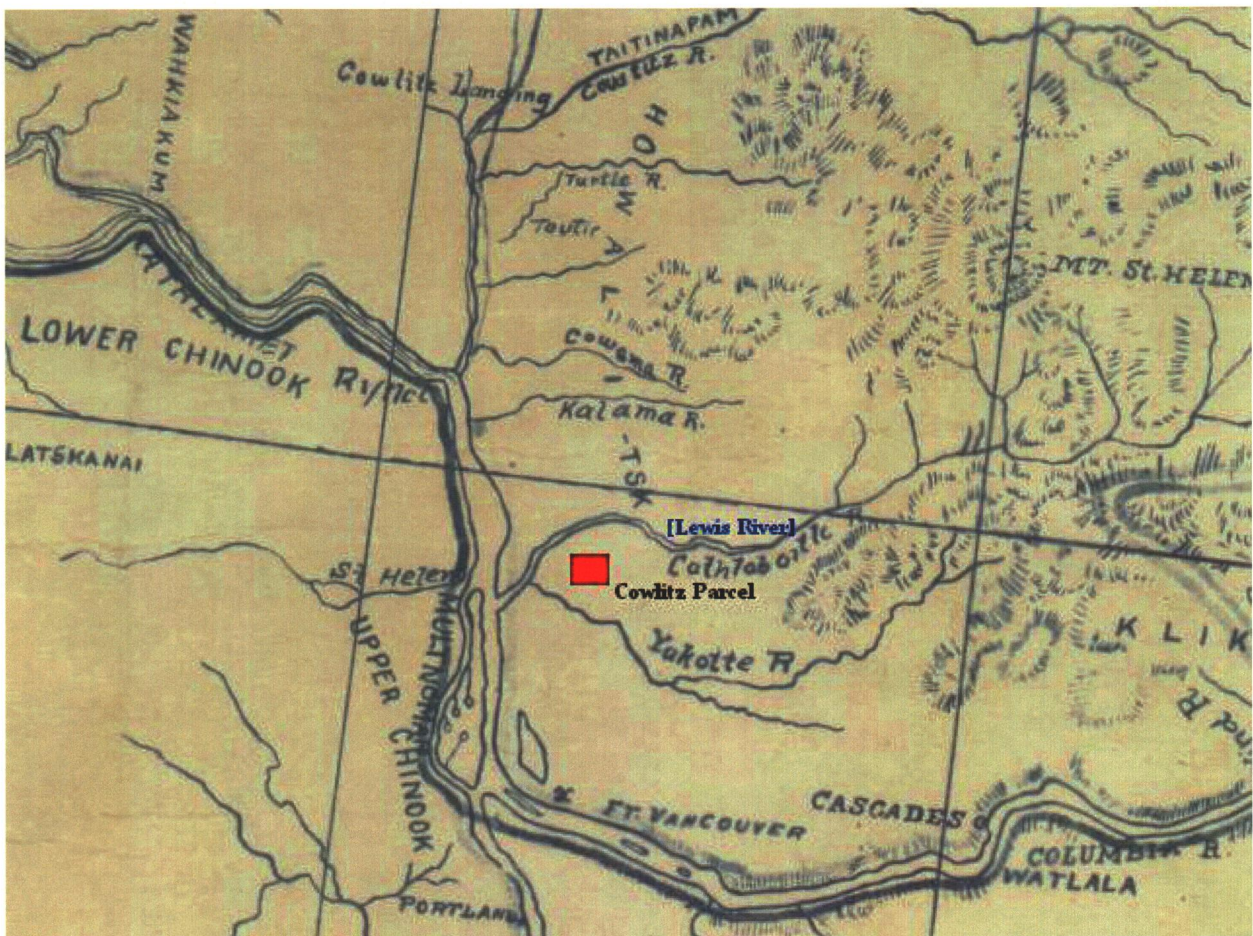
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<sup>18</sup> BAR suggests that these Indians may have been Klickitat. See HTR at 25. We respectfully suggest that BAR’s interpretation directly conflicts with Townsend’s express use of the word “Kowalitsk” and his explanation that his Klickitat guide “had no great love” for the Kowalitsk. It further directly conflicts with the testimony of the United States’ expert.

without paying fair compensation and that Cowlitz did not intend to make the same mistake with the Americans. Ow-hye stated:

Formerly the King Georges (English) came. They only paid them [the Cowlitz] a shirt to go from Cowlitz [River] to Vancouver. The Indians were very much ashamed at their treatment. They just now find out what the land was worth by seeing the French sell to the Whites. Several hundred dollars for a small piece with a house on it. It was not their land, but the Indians after all.

HTR at 40. Note that a map made under the direction of Governor Stevens in 1857 shows the Cowlitz ["Howalitsk"] extending to the Lewis (formerly known as the "Cathlopote") River. The Lewis River runs within one (1) mile of the Cowlitz Parcel.



**Figure 3.** Detail of "Map of the Indian nations and tribes of the territory of Washington . . . west of the mouth of the Yellowstone. Made under the direction of Isaac I. Stevens, Governor of Washington Territory & Superintendent of Indian Affairs, March 1857, drawn by William H. Carlton, surveyor and top eng." ("Howlatisk" was Governor Stevens' spelling of what today is spelled "Cowlitz.")

10. The United States' expert in the Cowlitz Indian Claims Commission litigation acknowledged that the Cowlitz hunted and gathered in the area of the Lewis River. Dr. Carol Riley testified:

Q: Now, considering your knowledge of the ecology of the region, can we say that the area [submitted by the United States as the Cowlitz' exclusive use and occupancy] in all probability amply supported the Indians that lived there at any given time?

A: Certainly, it wouldn't have included the hunting land, no matter how small the population dropped. If they hunted certain kinds of game you would have to go beyond that area.

Q: Well, would it [the United States' asserted exclusive use and occupancy area] support two hundred people with ease?

A: I should think it would support two hundred people with ease. But I think those two hundred people would go outside of it on occasion; I mean, in an economic sense, to hunt, to gather, this sort of thing.

Q: Did this blue line [the United States' asserted exclusive use and occupancy area] close the area that you believe the Cowlitz Indians proper exclusively used and occupied in this fashion?

A: It is an area that had the great majority of their use, yes. But I think they went outside of it on occasion. In going outside of it, I think they ran into other people, people, say, from the Lewis River[.]

*The Cowlitz Tribe v. United States*, Transcript, Vol. 3 of 5 at p. 300-302. The Lewis River is less than one (1) mile away from the Cowlitz Parcel.

11. Cowlitz occupancy near Kelso, Washington is also documented:

[I]n 1849 Joseph Lane, Superintendent of Indian Affairs for the Territory of Oregon, recorded, "[t]he Cowlitz Indians live on the Cowlitz river from its mouth [where Kelso is located] to the settlements. They number about 120, they have a few arms; are well disposed, have a few horses, and live by hunting and fishing.

*Cowlitz Tribe of Indians*, 21 Ind. Cl. Comm. at 156. Kelso is located approximately eighteen (18) miles north of the Cowlitz Parcel.

12. BIA-BAR acknowledged that Cowlitz members were included in the federal census for Clark County as early as 1850. *See* GTR at 51.

## 1856 THROUGH 1919 (ROBLIN ROLL)

13. Cowlitz use and occupancy of the area near the Cowlitz Parcel continued after the 1855 Chehalis River Treaty Council. For example, BIA-BAR notes that sometime between 1855 and 1856, a Cowlitz Indian (Zack), “while hunting near Chelatchie Prairie on the Lewis River saw 200 armed warriors and hurried downstream to warn American settlers during the 1855-1856 war.” HTR at 99 n.86. The Lewis River is less than one (1) mile from the Cowlitz Parcel and Chelatchie Prairie is six (6) miles east of the Cowlitz Parcel.
14. BIA-BAR reports that Cowlitz villages were observed near Monticello (present day Kelso/Longview). As described in an 1858 Commissioner of Indian Affairs Report:

Lower Cowlitz, numbering 250, extends from the Cowlitz farms to the mouth of the [Cowlitz] river. They live chiefly by fishing. Formerly they hunted to some extent, but since the war they have been deprived of their fire-arms. They are scattered along the banks of the river from the Landing to Monticello[.]

HTR at 71. This area is approximately eighteen (18) miles north of the Cowlitz Parcel.
15. BIA-BAR concluded that a number of Cowlitz members resided near the Kelso area during this time period. For example: “Lucy (Quil-a-nut), was a Lower Cowlitz woman from near Kelso at the mouth of the Cowlitz River.” GTR at 9. Again, Kelso is approximately eighteen (18) miles from the Cowlitz Parcel.
16. BIA-BAR further concluded that every federal census of Clark County (in which the Cowlitz Parcel is located) from 1870 to 1900 included Cowlitz people. GTR at 51-52.
17. In 1916, the Assistant Commissioner of Indian Affairs instructed Charles A. Roblin to investigate applications for Quinault enrollment and allotment and to prepare a list of “unattached” Indians of northwest Washington and the Puget Sound area.” HTR at 117. The “Roblin Roll” designated the tribal affiliation of those “unattached” Indians (i.e., landless Indians unattached to a reservation). GTR at 68, 69. The 1919 Roblin Roll recorded that Cowlitz members lived in the towns of Ridgefield, Battle Ground, and Vancouver, Washington (all within Clark County), and that 51 Cowlitz members lived even further south in Oregon. ATR at 150. Ridgefield is one (1) mile south, Battle Ground is seven (7) miles southeast, and Vancouver is twelve (12) miles south of the Cowlitz Parcel.
18. BIA-BAR reports that in 1938 the Vice President of the Tribe (Maude Wannasay) lived in Kelso, approximately 18 miles from the Cowlitz Parcel. GTR at 98, 99 (“in 1938 Castama was succeeded as vice president by Maude Wannassay of Kelso”).

These historical data points, already accepted in the ICC litigation and/or by the Bureau of Indian Affairs, make clear that since the time of first white contact, the Cowlitz Tribe hunted, traded, lived, married, and died in the area in which the Cowlitz Parcel is located.

(b) The Cowlitz Tribe's Modern Connection to the Area

NIGC, Interior, and the courts also have focused on whether the parcel is located in an area with which the Tribe has modern connections. This emphasis on the Tribe's modern connections makes perfectly good sense. Land loss and termination inflicted extreme hardship on tribes, often resulting in geographic shifts of tribal populations. Modern era tribes are not necessarily located exactly where they were at the time of first white contact. Hence the restored lands analysis properly places significant weight on the present needs and location of a tribe and its members – *particularly where the Tribe is landless* – rather than singularly focusing on where the tribe may have been centered historically. It is perfectly appropriate that the restored lands exception should consider the needs of landless tribes as they are situated today.

Hence, in its *Wyandotte* Opinion, NIGC found that the Wyandotte Tribe did not satisfy the modern connection component of the geographic location factor because in that case the parcel was located 175 miles from the seat of tribal government, its population center, its youth learning center, its seniors programs and its educational assistance programs. NIGC *Wyandotte* Opinion at 10.

In contrast, in its *Grand Traverse* Opinion, NIGC found that the Grand Traverse Band did satisfy the modern connection component of the geographic location factor because the subject land was located within the Tribe's service area and because the Tribe maintained a housing development and youth camp in the general area of the subject parcel. NIGC *Grand Traverse* Opinion at 16, 18. Similarly, as part of its reasoning for finding that the subject parcel constituted restored lands, Interior observed in its *Coos* Opinion that the subject parcel in that case was located within the Tribe's service area. Interior *Coos* Opinion at 13.

The Cowlitz Parcel is within a reasonable distance from existing governmental offices (located on fee land approximately 24 miles away in Longview). This distance is similar to distances found in the fact patterns of other restored tribes. For example, the Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians' government offices are located approximately 42 miles from its restored lands in Florence, Oregon. Similarly, the Grand Traverse Band of Ottawa and Chippewa Indians' restored lands are located approximately nineteen (19) miles from its government center.<sup>19</sup>

In addition, the Cowlitz Parcel is centrally located in an area that encompasses a significant portion of the Tribe's current membership. In evaluating the status of the Tribe in 1997, Interior found that over 75% of the Tribe's membership was located in Washington and Oregon (Oregon is immediately adjacent and to the south of Clark County, *see Figure 4* below). ATR at 145. The ATR showed that a substantial number of Cowlitz members lived in Portland, Oregon, as well as Vancouver, Washington, both to the south of the Cowlitz Parcel. The ATR further showed that a substantial number of members lived immediately to the north of the parcel in the Kelso/Longview area just over the Clark County border in Cowlitz County, Washington. As demonstrated in the

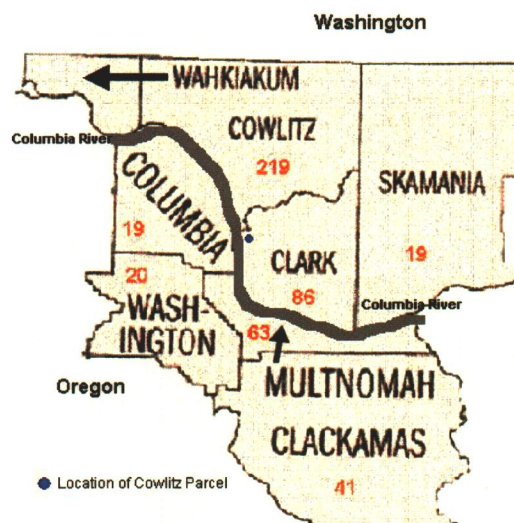
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<sup>19</sup> These distances were computed as the crow flies from the town in which the tribe's governmental offices are located to the town in which the tribe's restored lands are located.

map and table below, the Cowlitz Parcel is centrally located for 467 tribal members living in Clark and surrounding counties, including 143 members living to the south and east over the Oregon border.<sup>20</sup>

County	Population Numbers Listed in Interior's 1997 Anthropological Technical Report	2005 Population <sup>21</sup>
Multnomah County, OR	44	63
Washington County, OR	(not readily apparent)	20
Clackamas County, OR	(not readily apparent)	41
Columbia County, OR	(not readily apparent)	19
Clark County, WA	28	86
Cowlitz County, WA	94	219
Skamania County, WA	6	19
<b>TOTAL COWLITZ POPULATION IN CLARK AND IMMEDIATELY-SURROUNDING COUNTIES</b>		<b>467</b>

**Figure 3:** Cowlitz Tribal Member Population Numbers in Clark and surrounding counties



**Figure 4:** Washington and Oregon Counties surrounding Clark County with 2005 tribal member population numbers.

Furthermore, the Indian Health Service (“IHS”) has designated Clark County (as well as neighboring Cowlitz and Skamania Counties) as the Tribe’s IHS “Service Delivery Area.” See IHS letter dated August 27, 2002. Likewise, the United States Department of Housing and Urban Development (“HUD”) has designated Clark, Cowlitz and Skamania Counties as part of the Tribe’s “Formula Area” for Indian Housing Block Grants (“IHBG”).<sup>22</sup> In the western part of Washington,

<sup>20</sup> Cowlitz’s total membership population is over 3,000, much of which is relatively widely dispersed.

<sup>21</sup> Population figures provided by the Cowlitz Tribe. See letter from Cowlitz Indian Tribe Enrollment Officer Nancy Osborne, dated March 9, 2005, copy attached at **Tab M**.

<sup>22</sup> We note that HUD issues Indian Housing Block Grants pursuant to a formula based on the need of Indian families within the Tribe’s Formula Area. HUD’s FY 2005 Estimate Formula Response Form demonstrates that there is a staggering need for Indian housing and economic opportunities in southwestern Washington. Within the Cowlitz Formula Area HUD indicates that:

- 346 Indian households earn less than 30% of the median family income;

tribes' service areas often overlap. However, both the IHS and HUD service area designations identify Clark and Cowlitz Counties as *exclusively* Cowlitz. Copies of the documents evidencing the IHS and HUD service area designations are attached at **Tab O**. (Although BIA has not yet designated a service area for the Tribe, the Tribe is in the process of submitting a formal request for a service area designation that will include Clark County.)

Of particular note, the Cowlitz Tribe has a strong modern connection to the Cowlitz Parcel itself. The Tribe made a house on the property available for a tribal member and her three children (also tribal members) who, until recently, lived on the property for more than three years. This tribal member is a single mother, trained as a nurse who has for a time been unable to find employment. The Tribe currently is renovating the house and will again make it available for tribal member residence when the renovation is completed.

In sum, the Tribe's historical and modern connections to the immediate area surrounding the Cowlitz Parcel demonstrate a strong, continuing relationship to the area, a relationship which fully supports a finding that the Cowlitz Parcel constitutes "restored lands" within the meaning of IGRA Section 20 (b)(1)(B)(iii).

### **3. The Temporal Relationship of the Acquisition to the Tribal Restoration.**

In evaluating whether a parcel of land is "restored," NIGC, Interior and the federal courts have considered whether there is a reasonable temporal connection between restoration of federally-recognized tribal status and the acquisition of the land at issue. Indeed, the court in *Grand Traverse Band II* expressly found that "the land may be considered part of a restoration of lands *on the basis of timing alone*." *Grand Traverse Band II*, 198 F. Supp. 2d at 936 (emphasis added). *See also*, NIGC *Mechoopda* Opinion at 11 ("the heart of this inquiry is the question of whether the timing of the acquisition supports a conclusion that the land is restored").

The passage of several years between restoration and land acquisition is typical, however, as Interior has noted that "it will often be the case that newly restored tribes will, out of practical necessity, take some time to acquire land." Interior *Cox* Opinion at 13-14. In note 16 of that Opinion, Interior signaled that as much as 25 years may be a reasonable time period within which to acquire restored lands. *Id.* at 14. However, to help determine whether the temporal connection is

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- 422 Indian households earn between 30 and 50% of the median family income;
  - 535 Indian households earn between 50 and 80% of the median family income;
  - There are 240 overcrowded households (more than 1 person per room or without kitchen or plumbing); and
  - 427 households have housing expenses that are greater than 50% of their income. HUD categorizes these costs as "severe."

A copy of the HUD FY 2005 Estimate Response Form is attached at **Tab N**. (HUD has not provided a breakdown of these numbers on a tribe-by-tribe basis.)

adequate, the courts and the agencies also have looked to the question of whether the applicant tribes already have acquired other trust lands. See *Grand Traverse Band II*, at 934-935; *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians*, at 164; *Grand Traverse Band I*, at 700 (“the factual circumstances” of the acquisition may limit the determination of restored lands); NIGC *Karuk* Opinion; NIGC *Wyandotte* Opinion (fact that the tribe acquired other parcels of land in trust during the interim period leads to conclusion that there is not a “sufficient ‘temporal relationship’ between any restoration and the lands acquisition”).

The table below summarizes the situations in which NIGC and Interior have found that the temporal relationship is, or is not, adequate:

Tribe	Interval of years between acknowledgement and acquisition	Adequate Temporal Connection?
Karuk Tribe of California	22 years	NO, in part because the tribe acquired other trust lands during the interim period. See NIGC Karuk Opinion at 9.
Wyandotte Nation	18 years	NO, in part because tribe acquired other trust lands in years 1 through 6 after recognition. See NIGC Wyandotte Opinion at 13-14.
Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians	14 years	YES, acquired the land as soon as it was available. See Interior Coos Opinion at 13-14.
Bear River Band of Rohnerville Rancheria	10 years	YES, land was the first trust acquisition of the tribe. See NIGC Rohnerville Opinion at 14.
Grand Traverse Band of Ottawa and Chippewa Indians	9 years	YES. First lands Band sought to be put in trust after passage of IGRA. See NIGC Grand Traverse Opinion at 15-16.
Mechoopda Indian Tribe of the Chico Rancheria	9 years	YES, the parcel was the first trust acquisition for the tribe. See NIGC Mechoopda Opinion at 12.
Cowlitz Indian Tribe Acknowledged January 4, 2002	January 4, 2002, the same day	The answer here should be “YES.”

As discussed in detail in Part II Section 1 above, the Cowlitz Tribe so highly prioritized restoration of a land base that it began to search for parcels of land even before it received federal recognition. It eventually identified an appropriate parcel, so that when on January 4, 2002 Interior

announced its final decision acknowledging the Tribe, the Tribe was able to hand-deliver to the Bureau's Portland Regional Office its fee-to-trust application for the Cowlitz Parcel the *very same day*.

In our opinion the fact that the Cowlitz Tribe applied for trust status for the Cowlitz Parcel the same day as receiving a Final Determination restoring its tribal status, particularly when coupled with the fact that the Tribe has no other trust land, presents the strongest case for a finding of restored lands based solely on temporal connection that ever has been presented to NIGC or Interior.

## CONCLUSION

For all of the foregoing reasons, the Cowlitz Indian Tribe respectfully urges that NIGC conclude that as a legal matter the Cowlitz Indian Tribe is a restored tribe, and that the Cowlitz Parcel (when the United States acquires title to it) constitutes "restored lands," as those terms are used in Section 20 (b)(1)(B)(iii) of IGRA.

We also reiterate here our offer to provide additional information responsive to any questions or concerns that might be raised during NIGC's review of the Tribe's request for an opinion as to its status as a restored tribe as to the Cowlitz Parcel's status as restored lands.

We thank the General Counsel's Office, the Associate Solicitor for Indian Affairs, and the Director of the Indian Gaming Management Staff in advance for your time and attention to the Tribe's request.